(2022) 11 PAT CK 0080

Patna High Court

Case No: Civil Writ Jurisdiction Case No. 1071 Of 2021

Mohan Shah		APPELLANT
	Vs	
State Of Bihar		RESPONDENT

Date of Decision: Nov. 21, 2022

Acts Referred:

- Bihar Pension Rule, 1950 - Rule 27, 43(c)

Hon'ble Judges: Harish Kumar, J

Bench: Single Bench

Advocate: Ravi Ranjan, Namrita Singh

Final Decision: Disposed Of

Judgement

Heard Mr. Ravi Ranjan, learned counsel for the petitioner and Ms. Namrita Singh, learned counsel for the State.

By filing the present writ application, the petitioner seeks a direction upon the respondent for payment of his gratuity withheld by respondent no. 5 on

the ground of a criminal case being pending against him. He further seeks for setting aside the endorsement dated 08.07.2019 made by the District

Programme Officer (Establishment), Sitamarhi whereby a direction has been given to take action for payment of gratuity after disposal of the criminal

case pending against the petitioner.

The short facts, which led to the filing of the present writ application is that the petitioner was appointed as an Assistant Teacher on 14.08.1984 and

after serving for more than 34 years he superannuated from the post of Head Master, Middle School Hardia, Pupri Sitamarhi on 30.11.2018.

It is contended that some how and the other one criminal case bearing Pupri P. S. Case No. 84 of 2014 was registered on account of charges of some

irregularities in the distribution of mid-day-meal and the same is still pending against the petitioner. It is next submitted that with regard to the aforesaid

charges, the petitioner was also put to departmental proceeding but culminated into his exoneration. It is further submitted that having been

superannuated on 30.11.2018, No Dues Certificate has been issued in favour of the petitioner and all other retiral dues, except gratuity have stood paid

to the petitioner.

On the other hand, learned counsel for the State vehemently contended that since the petitioner was found involved in certain irregularities and a

criminal case was instituted against him and the same is still pending, the amount of gratuity has been withheld, however, all the other retiral dues have

stood paid to the petitioner. It is further submitted that the payment of the gratuity amount would also be paid to the petitioner after disposal of the

criminal case, if the petitioner would be exonerated from the charges.

From the submissions made herein above and the materials available on record admittedly there is no departmental proceeding or any outcome

suggesting the petitioner is found to be guilty of any misconduct save and except the pendency of a criminal case arising out of Pupri P. S. Case No.

84 of 2014. It is also the fact that the petitioner superannuated on 30.11.2018 and prior to his superannuation an amendment has been incorporated in

the Bihar Pension Rule, 1950 by amending the Rule 43(c) on 19.07.2012, which clearly stipulates as under:-

Ã¢â‚¬Å“43(c) Where the departmental proceeding or judicial proceeding, in which the prosecution has been sanctioned against such servant, initiated

during the service period of the government servant, is not concluded till the retirement of the government servant, the amount of provisional pension

shall be less than the maximum admissible amount of pension but shall in no case be less than 90% (ninety percent).Ã¢â‚¬â€‹

It is needless to say that the issue with regard to the payment of pension and gratuity to the employees who are facing departmental inquiry or judicial

proceeding at the time of his superannuation has set at rest by the learned Full Bench of this HonÃ¢â‚¬â„¢ble Court in the case of Arvind Kumar Singh Vs

State of Bihar and Ors reported in 2018 (II) PLJR 933, it would be apt to quote Paragraph Nos. 25 & 30 of the said judgement, which is as follows:-

Ã¢â‚¬Å“25. When this amendment was incorporated on 19th of July, 2012, the State Government was aware of the earlier statutory circular dated 31st of

July, 1980 and the administrative circulars of 1974, but while incorporating a provision in the rule itself by amending it, i.e. Rule 43(c), the rule maker

consciously used the word Ã¢â‚¬Å“pensionÃ¢â‚¬ only without carving out an exception with regard to withholding of gratuity. The omission of the word

Ã¢â‚¬Å“gratuityÃ¢â‚¬ in the amended provisions of Rule 43(c), in our considered view, is a deliberate and conscious omission on the part of the rule maker.

The rule maker knew that pension includes gratuity and when they speak about payment of provisional pension, the rule of interpretation mandates us

to hold that it would mean payment of not only provisional pension but also gratuity until and unless the rule specifically provides for withholding of

gratuity. That being so, once Rule 43(c) was incorporated into the statute and when Rule 43(c) does not empower the Government to withhold gratuity

and when gratuity includes pension, in view of the provisions of Rule 27, the contention of the State Government and the learned Advocate General

cannot be accepted. We have to hold that once Rule 43(c) was incorporated in the statutory rule, the effect of the earlier statutory notification dated

30th of July, 1980 is wiped out, nullified or deemed to have been repealed. Incorporation of Rule 43(c) on 19th of July, 2012 will have the effect of

annulling the earlier notification dated 30th of July, 1980 or the circulars of 1974 and therefore, once a statutory provision-Rule 43(c) is incorporated in

the rule itself, it has to be given its full and complete meaning, by adopting a literal meaning to each and every word used therein, and if this principle

of statutory interpretation is followed, the contention of the State Government has to be rejected and we have no hesitation in holding that after coming

into force of the amendment to the Pension Rules by incorporating Rule 43(c) on 19th of July, 2012, an employee who is facing departmental inquiry

or judicial proceeding on the date of his superannuation would be entitled to provisional pension which would include gratuity to the tune of an amount

not less than 90 per cent.

30. Accordingly, we answer the questions referred to in C.W.J.C. No. 15328/2016 in the following manner:

(1). The law laid down by the Bench of this Court in the case of Vijay Kumar Mishra (supra) holding that Leave Encashment of a Government

employee can be withheld, is a correct proposition of law, however, we clarify that withholding of the leave encashment is not by virtue of the

provisions of the Bihar Pension Rules or the leave rules, but, encashment of leave, being governed by executive instructions, its withholding by

executive instruction is permissible and is in accordance with law. To that effect, the findings recorded and the observations made in the case of Vijay

Kumar Mishra (supra) may be treated as incorrect and not indicating the correct position.

(2). As far as the second question is concerned, we answer it by holding that the law laid down by the Bench of this Court in the case of State of

Bihar and ors.v. Mozaffar Hassan (supra) and by the learned Single Judge in the case of Ram Prakash Yadav (supra) and the law laid down in the

case of Vijay Kumar Mishra (supra) to hold that gratuity can also be withheld under the provisions of the Bihar Pension Rules is an incorrect

proposition of law. It has not been correctly held. Gratuity cannot be withheld in view of the provisions of Rule 43(c) of the Bihar Pension Rules and

the discussion made by us hereinabove, to that extent the law laid down in the case of Vijay Kumar Mishra and Mozaffar Hassan (supra) by the

coordinate Division Bench stand overruled.

In view of the aforesaid settled legal position as also the judgement rendered by the learned Full Bench of this HonÃ¢â‚¬â„¢ble Court in the case of Arvind

Kumar Singh Vs. State of Bihar and Ors. (supra). This court finds no jutification in withholding the amount of gratuity of the petitioner on account of

pendency of criminal case. Hence the present writ petition stands disposed of with a direction to the respondent no 4 to consider the case of the

petitioner preferably within a period of eight weeks from the date of receipt/production of a copy of this order. It is made clear that any endorsement

made in the file against the mandate of the law is unsustainable and fit to be ignored.

It is needless to say that if the case of the petitioner finds favour, the order for payment of the amount under the head of gratuity must be passed

within the aforesaid period.

Accordingly, the present writ application stands disposed of with the aforesaid observation and direction.